IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-1994

JULIAN VELLA,

Petitioner,

vs

FORD MOTOR COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The Opinion of the Sixth Circuit Court of Appeals entered on April 8, 1974 affirming in part and reversing in part the jury verdict and Order of the District Court for the Eastern District of Michigan, Southern Division, with mandate for Entry of Order of Dismissal is not yet reported. The Opinion of the District Court of July 17, 1972 denying respondent's Motion for Judgment Notwithstand-

ing the Verdict on the award of maintenance and cure under the third count of plaintiff's complaint and denying plaintiff's motion for interest, attorneys fees and costs is unpublished. Both opinions are appended hereto.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

STATUTES AND TREATIES INVOLVED

Petitioner cites 54 Stat. 1936, (Shipowner's Liability Convention), Article 4, Paragraph 1 as being involved herein which paragraph reads as follows:

> "The shipowner shall be liable to defray the expense of medical care and maintenance until the sick or injured person has been cured, or until the sickness or incapacity has been *declared of a permanent nature*". (underscoring ours)

Respondent contends the cited convention in *inapplicable* by its own terms to the case herein, *which occurred on the Great Lakes*. Article 1, Paragraph 1 reads as follows:

> "1. This convention applies to all persons employed on board any vessel, other than a ship of war, registered in a territory for which this convention is in force and ordinarily engaged in *maritime navigation*."

Article 20 provides:

> "The French and English texts of this convention shall both be authentic, with the following understanding to be made a part of the ratification:
>
> "* * * that the United States Government understands and construes the words, "maritime navigation" appearing in this convention *to mean navigation on the high seas only.*

SEE ALSO the Law of Admiralty, Gilmore and Black, Page 277, §6-19—Same: Shipowner's Liability Convention; 54 Stat. 1693, 1938 A.M.C. 1297; 6B Benedict, Admiralty 1315 (7th Ed. Rev.)

Respondent does not question the citation of the Jones Act, 46 USC §688 et seq. as set forth in the Petition.

QUESTIONS PRESENTED

Petitioner has set forth the following questions in his Petition for Writ of Certiorari:

I

IS A DISABLED SEAMAN WHO CONTRACTED BY TRAUMA A PERMANENT DISEASE WHILE IN THE SERVICE OF A VESSEL ENTITLED TO MAINTENANCE AND CURE PAYMENTS DURING THE INTERUM BETWEEN THE PERIOD THE INCIDENT OCCURRED AND THE TIME THE DISEASE WAS MEDICALLY DIAGNOSED AND PROCLAIMED INCURABLE?

II

(a) WHERE A CREWMAN SUFFERED AN INJURY FROM A FALL CAUSED IN PART BY AN UNSAFE PLACE TO WORK, IS A JURY INSTRUCTION OF SOLE FAULT OF THE INJURED SEAMAN IMPROPER?

(b) WOULD THE FACT THAT THE SEAMAN BY JOB DESCRIPTION WAS OBLIGED TO KEEP THE PLACE SAFE DENY THE SEAMAN OF THE LIABILITY DOCTRINE OF WARRANTY OF A SEAWORTHY VESSEL?

Respondent contends the questions appearing under its Counter-Statement of Questions are the proper questions for review by this Honorable Court.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Respondent contends the questions presented on appeal to the Sixth Circuit Court of Appeals were as follows and should be the questions for review by this Honorable Court.

I

MAINTENANCE AND CURE

(a) Did Plaintiff [Petitioner herein] fail to bring himself within the scope of maintenance and cure.

(b) Does palliative treatment, as distinguished from curative treatment, provide the basis for an award for maintenance and cure.

II

SOLE FAULT

Was it prejudicial and reversible error for the trial judge to charge the jury on the question of Plaintiff-Appellant [Petitioner herein] being the sole cause of his injury where there is no evidence in the record to support such charge?

COUNTER-STATEMENT OF THE CASE

Petitioner claimed to have sustained an injury from an alleged fall in the lower engineroom of the S.S. ROBERT S. McNAMARA while attempting to replace an uplifted floor plate. He claimed to have "lost his balance, slipped on the oily floor plate and struck his head on an electrical box as he fell to the plates."

Petitioner, a crew member with the rating of an oiler aboard the S.S. ROBERT S. McNAMARA was discharged from the vessel on June 29, 1968 for failure to obey the orders of a superior officer. During the course of the preparation of his discharge, Petitioner for the first time reported he had been injured in a fall in the lower engineroom, "foot slipped while replacing lower engineroom deck plate" on some unknown date in early April, 1968. Petitioner requested and was given a Master's Certificate which permitted him to go to the U.S. Public Health Service Hospital in Detroit. Immediately upon leaving the vessel, Petitioner was examined at respondent's plant hospital and declared "able to work". He was subsequently seen and examined on three occasions at the Public Health Service Hospital. Following each visit he was pronounced "fit for duty".

Petitioner complained that after the accident he suffered from headaches and dizzy spells.

Respondent contended the accident never occurred. In the alternative, Respondent contended that even if the accident did occur, such was due to the sole or contributing negligence of the Petitioner and not to the negligence of Respondent or the alleged unseaworthiness of the S.S. ROBERT S. McNAMARA.

There were no witnesses to the accident. Respondent based its defense upon the testimony elicited from Petitioner, the physical evidence and testimony of his fellow workers.

Approximately a year and half following Petitioner's discharge from the vessel suit was instituted by Petitioner

in the United States District Court for the Eastern District of Michigan, Southern Division with counts under the Jones Act 46 USC §688 et seq., unseaworthiness under the General Maritime Law and for maintenance and cure.

After a lengthy trial, the jury found adversely to Petitioner on his liability claims under the Jones Act and for unseaworthiness of the vessel. The jury found the accident occurred due to the sole fault of Petitioner, but awarded him maintenance and cure from June 29, 1968 to June 29, 1970.

Judgment was entered pronouncing no cause for action under the Jones Act and for unseaworthiness of the vessel and for maintenance and cure payments at the rate of $8.00 per day for two years.

Respondent moved for judgment not withstanding the verdict on the maintenance and cure award and Petitioner moved for interest, attorneys fees and costs. Both motions were denied by the trial Court. Petitioner appealed to the Sixth Circuit Court of Appeals on the single issue of the "sole fault" charge to the jury by the trial Court and Respondent appealed on the propriety of the maintenance and cure award.

The Sixth Circuit Court of Appeals affirmed the jury finding of No Cause for Action on the negligence counts under the Jones Act and for the alleged unseaworthiness of the vessel and reversed the jury award for maintenance and cure. Whereupon the judgment of the District Court was affirmed in part and reversed in part and the action remanded for entry of an Order of Dismissal.

SUMMARY OF ARGUMENT

MAINTENANCE AND CURE

Responding first to Petitioner's question I,

> "Is a disabled seaman who contracted by trauma a permanent disease while in the service of a vessel entitled to maintenance and cure payments during the interim between the period the incident occurred and the time the disease was medically diagnosed and proclaimed incurable".

Respondent contends such must, under the weight of judicial authority and the decisions of this Court, be answered in the negative.

The questions presented by Respondent to the Sixth Circuit Court of Appeals were to the same point, namely, to-wit:

> (a) Did plaintiff [Petitioner herein] fail to bring himself within the scope of maintenance and cure, and
>
> (b) Does palliative treatment, as distinguished from curative treatment provide the basis for an award for maintenance and cure.

Respondent first contends Petitioner failed to bring himself within the scope of maintenance and cure *because Petitioner failed to prove* that the medical care and attention received has produced or is likely to produce some lasting medical recovery or improvement in his condition. The criteria is *not* that he is entitled to maintenance and cure until the disease was medically diagnosed and proclaimed incurable. Rather, he is entitled to maintenance and cure until *only* until the seaman is cured to the maximum extent medically possible. *Farrell* v. *United States*, 336 U.S. 511, 518 (1949). Once the seaman reaches "maximum medical

recovery", the shipowners obligation to provide maintenance and cure ceases. *Vaughn* v. *Atkinson*, 369 U.S. 527, 531 (1962). Here, the Petitioner's condition was incurable at the onset of the condition which occurred immediately following the accident.

Secondly, the treatment received by Petitioner, analgesics for headache and darvon for pain, was but palliative in nature, i.e., to ease without curing. Under the decided cases, such does not provide the basis for the payment of maintenance and cure. *Farrell* v. *United States*, supra; *Calmar S.S. Corp.* v. *Taylor*, 303 U.S. 525. The rule as stated by this Court is as follows:

> "One who is injured or becomes ill while serving as a seaman is entitled to maintenance and cure during that period of time in which he is suffering from a curable disability and obtaining curable treatment therefor.* * * * The right ceases, however, when the seaman has reached his maximum recovery * * *. A continuation of treatment *does not* continue the right to maintenance and cure if that treatment is palliative, only, as distinguished from curative treatment".

The Petitioner bears the burden of alleging and proving facts that bring him within the scope of maintenance and cure. *Prendis* v. *Central Gulf Steamship Co.*, 330 F. 2d 893 (CA 4th, 1963); *Donovan* v. *Esso Shipping Company*, 152 F. Supp. 347 (D.C.N.J., 1957; The San Antonio, 1 F. Supp. 231, Aff'd 61 F. 2d. 623 (3rd Cir. 1932)).

To recover for maintenance and cure, Petitioner must *first* show his injury or illness was incurred or became manifest while in the service of the vessel. The jury below resolved this question of fact by its verdict wherein it stated

Petitioner's accident aboard the S.S. ROBERT S. McNAMARA was due to his sole negligence.

In *addition*, however, plaintiff must prove that the medical care and attention received has produced or is likely to produce some lasting medical recovery or improvement in his condition. It is this additional element of proof wherein plaintiff failed to sustain his burden and the jury verdict must, as a matter of law, be set aside.

It is unrefuted that Petitioner suffered from a vestibular disorder which is incurable. Petitioner contends that while such was not diagnosed until some year and a half after he left the vessel, he relates the disability to the date of the alleged accident in early April, 1968 and that he suffered from the disability when he left the vessel so as to bring himself within the scope of maintenance and cure. It is likewise unrefuted that there is no known medical treatment leading toward a cure of the vestibular disorder. The treatment given is but palliative in nature, i.e., to ease without curing. The only treatment rendered to Petitioner *at any time* was analgesics for headaches and darvon for pain.

Under the above facts, the cases are clear and cogent that Petitioner failed to sustain his burden of bringing himself with the scope of maintenance and cure and that he is *not* entitled to maintenance and cure in any amount. In *Mackey* v. *National Steel Corporation*, 292 F. Supp. 222 (D.C.N.D. Ohio, 1967) Aff'd by the Sixth Circuit Court of Appeals on October 29, 1968, Case No. 18087, the Court was concerned with a totally disabling back condition in a seaman and the question of maintenance and cure. The Court, on discussing what the seaman must prove, stated at page 225:

> "To show that his ship service connected incapacity has not yet reached the level of maximum cure, i.e., maximum medical improvement, *it is concluded the seaman must prove that the medical care and attention has produced or is likely to produce some lasting medical recovery or improvement in his condition*" (emphasis ours)

The above statement followed a full discussion of the cases involving maximum cure in regard to permanent injury or disease and in particular *Farrell* v. *United States*, 336 U.S. 511, 69 S. Ct. 707. Again at page 225, the Court in Mackey, supra, stated:

> "Farrell, supra, demonstrates and defines a different measure of damages in an action for maintenance and cure. Seaman Farrell needed medical care from time to time 'to ease attacks of headaches and epiliptic convulsions'. Though necessitated by his injuries suffered in the service of the ship, a requisite for compensable cure, *Farrell's intermittent medical care did not qualify as compensable cure because it served only to ease his condition, while producing no lasting improvement*" (emphasis ours)

See also *Stewart* v. *Waterman Steamship Corporation*, 288 F. Supp. 629 (D.C.E.D. La. 1968) Aff'd CA 5th, 409 F. 2d. 1045, cert. den. 90 S. Ct. 1239, 397 U.S. 1011.

The given point when plaintiff reached maximum cure or maximum medical improvement was when the accident occurred in April, 1968. The definitive diagnosis a year and a half later only served to establish the nature of the disability as being a vestibular disorder which condition is incurable.

Failing then to prove he suffered from a curable ailment

or condition and received curable treatment therefor, the shipowner's obligation for maintenance and cure never came into being or to phrase it another way, Petitioner failed to bring himself within the scope of maintenance and cure.

To provide a basis for payment of maintenance and cure, the treatment being received by a seaman *must* be treatment leading toward a *cure*. This means treatment of the underlying or primary injury or illness and *not* its symptoms. *Stewart* v. *Waterman Steamship Corporation*, supra.

This in essence was the conclusion of the Sixth Circuit Court of Appeals in reversing the maintenance award by the jury and is in full accord with the decisions of this Court.

SOLE FAULT

Petitioner's second question is two-fold:

> (a) Where a crewman suffered an injury from a fall caused in part by an unsafe place to work, is a jury instruction of sole fault of the seaman improper? and,
>
> (b) Would the fact that the seaman by job description was obliged to keep the place safe deny the seaman of the liability doctrine of warranty of a seaworthy vessel?

These questions as presented to the Sixth Circuit Court of Appeals were encompassed within the following question:

> "Was it prejudicial and reversible error for the trial judge to charge the jury on the question of Plaintiff-Appellant [Petitioner herein] being the sole cause of his injury where there is no evidence in the record to support such charge?

The answer to this question, as discussed hereinafter, was that there was ample proof, evidence and testimony from which the jury, as the trier of the facts, could and did find the accident was due to the "sole fault" of Petitioner. The charge of the trial judge was proper and the Court of Appeals answered the question by stating:

> "We are not prepared to find that the record is lacking in material evidence to support the jury's verdict on the "sole cause" issue".

The main thrust of Petitioner's argument is that there was no evidence, proof or testimony upon which the jury could find the accident was due to the "sole negligence" of Petitioner and therefore the giving of a sole fault instruction to the jury constituted error.

Such may not be sustained on the record and the Sixth Circuit Court of Appeals so found.

The jury was the sole trier of the facts and charged with the responsibility of what witnesses it would believe and what weight it would give to the testimony and evidence presented.

There is no way to determine what was in the minds of the jury when it found the accident was due to the "sole fault or negligence" of the Petitioner.

The jury could have found the Petitioner was totally negligent in the manner in which he attempted to replace the deck plate, that there was no oil on the deck, but even if so, he should have wiped it up as one of his duties as an oiler, or that the oil, if it did exist, had nothing to do with his fall.

If oil on the deck is the classical example of an unseaworthy condition, *still* such must cause or contribute in

some way to the accident. The jury decided to the contrary and found the accident was due to his sole fault.

The Sixth Circuit Court of Appeals found that on the record there was ample testimony, evidence and proof from which the jury, as the trier of the facts, could conclude plaintiff's accident was due to his "sole fault". Under the decided cases this is wholly within the province of the jury and its finding should not be disturbed.

ARGUMENT

I

MAINTENANCE AND CURE

The Sixth Circuit Court of Appeals found that the jury award of maintenance and cure was without material support in the record and the action was remanded to the District Court for an Order of Dismissal.

In its opinion, the Court set forth the criteria for payment of maintenance and cure which is in accordance with the overwhelming weight of judicial authority. In discussing the applicable law, the Court stated:

> "Under the maritime law of the United States, a shipowner is liable to a seaman for maintenance and cure, regardless of the negligence of either party, if the seaman is injured while in the service of the ship. *Aquilar* v. *Standard Oil Company*, 318 U.S. 724 (1943).
>
> The duty of the shipowner to maintain and care for the seaman exists *only* until the seaman is cured to the maximum extent medically possible. *Farrell* v. *United States*, 336 U.S. 511, 518 (1949). In brief, once the seaman reaches "maximum medical recovery", the shipowners obligation to provide maintenance and cure ceases. *Vaughn* v. *Atkinson*, 369 U.S. 527, 531 (1962)".

The Court found that Petitioner's vestibular disorder was of a permanent nature from the date of the accident and not susceptible of curative treatment. In discussing this point, the Court stated:

> "***Presumably, the jury concluded that it was plaintiff's fall that caused the disorder and the disabling dizziness and headaches. However, the evidence clearly shows that a vestibular disorder is not a condition that can be cured or improved by treatment.*** No evidence was introduced in conflict with this conclusion of Dr. Heil [the Otolaryngologist]
>
> The record in this case does not permit an inference other than that plaintiff's condition was permanent immediately after the accident. It is not even alleged that plaintiff has ever received treatment for the condition itself, although he has received medicine for the symptoms of dizziness and headaches. That one may require or be helped by treatment for the symptoms of a disorder does not qualify him for maintenance and cure. *Farrell* v. *United States*, supra at 519. We find that the jury award of maintenance and cure is without material support in the record".

Petitioner seeks review of the decision of the Sixth Circuit Court of Appeals contending such is contra to a treaty of the United States and in conflict with the holding of one Circuit Court (3rd) which permits payment of maintenance and cure if treatment is but to ease the symptoms of the disease, but not to cure or improve the condition.

The convention [treaty] cited by Petitioner as support for the proposition that maintenance and cure is payable until the seaman is cured or until the sickness or incapacity

has been "declared permanent" is *clearly inapplicable* for the convention was accepted by the United States subject to the "understanding" that it was to apply to "navigation on the high seas only". The case at bar arose on the Great Lakes hence by its own terms, the convention does not apply. See discussion under Statutes and Treaties Involved, supra.

The law concerning the duration of the payment of maintenance and cure *does not* state such continues until the sickness or incapacity has been "declared of a permanent nature".

The overwhelming weight of judicial authority provides the seaman is entitled to payment of maintenance and cure until he is cured to the "maximum extent possible", *Farrell* v. *United States*, 336 U.S. 511, 518 (1949) or as it has been stated once the seaman reaches "maximum medical recovery", the shipowners obligation to provide maintenance and cure ceases. *Vaughn* v. *Atkinson*, 369 U.S. 527, 531 (1962).

The Sixth Circuit Court of Appeals in commenting on the holding of the Third Circuit, stated:

> "We are aware that the Third Circuit has taken a very liberal view as to when maintenance and cure may be awarded. See *Ward* v. *Union Barge Line Corp.*, 443 F. 2d 565 (3rd Cir., 1971). *This is definitely a minority position and is difficult to square with Farrell* v. *United States*, 336 U.S. 511 (1949). See *Berke* v. *Lehigh Marine Disposal Corp.*, 435 F. 2d 1073, 1076 N. 3 (2nd Cir.)" (emphasis ours)

The decision of the Sixth Circuit Court of Appeals is in accordance with the overwhelming weight of judicial authority.

The responsibility of the shipowner to provide maintenance and cure extends only until the point of maximum recovery. *Calmar S.S. Co.*, vs. *Taylor*, 303 U.S. 525 (1938); *Farrell* v. *United States*, 336 U.S. 511 (1949); a seaman is not entitled to 'cure' past the point at which his condition cannot be further improved. *Farrell* v. *United States*, supra; *Fitzgerald* v. *United States Lines Company*, 374 U.S. 16, 19 (1963); *Travis* v. *Motor Vessel RAPID CITIES* 315 F. 2d 805, 810-811 (8th Cir., 1963); *Desmond* v. *United States*, 217 F. 2d 948, 950 (2nd Cir. 1954) cert. denied, 349 U.S. 911 (1955); *Stewart* v. *Waterman S.S. Corp.*, 288 F. Supp. 629, 634 (E.D. La. 1963) Aff'd 409 F. 2d 1045 (5th Cir., 1969) cert. denied 397 U.S. 1011 (1970); an injured seaman's recovery for maintenance and cure should not be extended beyond the time when the maximum degree of improvement is reached. *Luksich* v. *Misetich*, 140 F. 2d 812 (9th Cir., 1944) cert. denied 64 S. Ct. 1280, 322 U.S. 761 *Berke* v. *Lehigh Marine Disposal Corp.*, 435 F. 2d 1073 (2nd Cir. 1970); the defendant is not liable for treatment which is only palliative in nature, i.e. that which eases without curing. *Stanovich* v. *Jurlin*, 227 F. 2d 249 (9th Cir., 1955); one who is injured or becomes ill while serving as a seaman is entitled to maintenance and cure during that period of time in which he is suffering from a curable disability and obtaining curative treatment therefor. That right ceases, however, when the seaman has reached his maximum recovery. A continuation of treatment does not continue the right to maintenance and cure if that treatment is palliative, only, as distinguished from curative treatment. *Farrell* v. *United States*, supra; *Calmar S.S. Corp.*, vs. *Taylor*, supra; *Roier* v. *Head & Head, Inc.* 226 F. 2d 927 (5th Cir.); *Ryan* v. *U.S. Lines Co.* 303 F. 2d 430 (2nd Cir.).

As stated in *Farrell* v. *United States*, supra,:

> "The liability for maintenance and cure does not extend beyond a time when the maximum cure possible has been effected, and Petitioner is *not* entitled to maintenance so long as he is disabled or for life. Id at 511, 69 S.Ct. 707. (emphasis ours)

Brief comment should be made on the decision of the learned District Court Judge wherein Respondent's Motion for Judgment Not Withstanding the verdict was denied.

The Court's decision was based upon *Marzean* v. *Nicholson Transit Co.*, 174 F. Supp. 348, USDC, E. D. Mich. 1959. This case is readily distinguishable from the case at bar. In *Marzean*, the Court stated at Page 350: [and at 68a]

> "We think that the only proper interpretation of the rule is that once the administration of curative treatment has ceased because medical science can do no more for the patient to improve his condition, then the seaman's right to maintenance and cure ceases".

Respondent has no quarrel with the above statement, however, it is clearly inapplicable to the case at bar for *curative treatment never commenced* in the case of Petitioner herein. The vestibular condition was incapable of cure from inception and no known treatment leading toward a cure was or is available. Petitioner received no treatment whatever except analgesics for headaches and pain. This merely served to ease his condition and such does not provide the basis for an award of maintenance and cure. In effect the right to maintenance and cure never attached. The maximum degree of improvement in the health of the Petitioner due to the vestibular condition was reached upon inception and recovery for maintenance and cure does not extend beyond this point.

The Petitioner's request for review of the decision of the Sixth Circuit Court of Appeals on the maintenance and cure award should be denied.

II

SOLE FAULT

The jury in the trial Court found no cause for action for either negligence or unseaworthiness because it believed that the accident was "due to the sole negligence of the plaintiff".

Petitioner contended the jury's findings on negligence and unseaworthiness was caused, at least in part, by the following instruction:

> "If you find the plaintiff was guilty of contributory negligence and that such contributory negligence was the sole cause of his injuries, you must return a verdict for the defendant".

Petitioner alleged that the trial Court committed reversible error in giving this instruction because there was no evidence that the accident was caused solely by the acts of the Petitioner.

The Sixth Circuit Court of Appeals disposed of this issue by stating:

> "As an abstract statement of law, plaintiff is correct when he asserts that an instruction on sole cause is improper if there is no evidence to support such a finding by the jury. See *McCarthy* v. *Pennsylvania Rwy. Co.*, 156 F. 2d 877 (7th Cir., 1946). In the present case, however, there was sufficient evidence to support the charge and the jury's conclusions. The

> plaintiff was an oiler on the "McNAMARA" and was responsible for keeping the area near certain moving machinery free from oil. There was evidence that it was his responsibility to remove the very oil upon which he slipped. Moreover, there was testimony that plaintiff used improper procedures in trying to lift rather than slide the plate into place. We are not prepared to find that the record is lacking in material evidence to support the jury's verdict on the 'sole cause' issue".

Petitioner contends that 'oil about a seaman's footing is a most classical instance of unseaworthiness'. Be that as it may, such must contribute in some way toward the accident. *The resolution of this factual question was purely for the determination of the jury as the trier of the facts.*

The question of whether negligence or unseaworthiness was a cause of the plaintiffs' injuries was one for the trier of fact. *Garcia* v. *Murphy Pacific Marine Salvage Co.*, 476 F. 2d 303 (5th Cir., 1973).

The Petitioner's claim is that while replacing an uplifted deck plate in the lower engineroom of the S.S. ROBERT S. McNAMARA he "lost his balance, slipped on the oily floor plate and struck his head on an electrical box as he fell to the plates". Testimony also disclosed that the Petitioner lifted rather than sliding the plate into place and that it was Petitioner's duty, as an oiler, to wipe up any oil on the deck. The trial judge instructed the jury that:

> "For the purposes of this action, injury or damage is said to be caused or contributed to by the unseaworthiness of the vessel when it appears from a preponderance of the evidence in the case that the unseaworthiness played any part, no matter how

> small, in bringing about or actually causing the injury or damage".

Thus, the jury was properly instructed that they must find in Petitioner's favor no matter how slight the Respondent's fault might have contributed to his accident.

The jury had ample evidence upon which it could have found, that although such a condition constituted unseaworthiness, Petitioner did not slip on the oil, but fell as a result of the manner in which he attempted to replace the plate.

The jury, by its verdict, rejected the assertion by Petitioner that the alleged unseaworthiness of the vessel due to the oil on the deck played any part whatever in causing or contributing to his accident.

In *State of Arkansas* v. *Godbehere*, 261 F. 2d 623, (8th Cir., 1958), it was stated:

> "It is the duty of the Court, in submitting the case to the jury, to confine its instructions to the issues raised by the pleadings and proof".

The charge of the trial judge in the instant case was fully in accord with the pleadings and proof presented.

Petitioner's plea on this issue must fail for the simple reason there was testimony, evidence and proof upon which the jury could and did find, as the trier of the facts, that Petitioner's accident was due to his "sole fault". In such finding the jury weighed and discarded the Petitioner's contention that oil on the deck constituted unseaworthiness and that such played any part in causing or contributing to his accident.

CONCLUSION

It is respectfully submitted the Petitioner has wholly failed to sustain his burden that there are special and important reasons why the writ should be granted. The decision of the Sixth Circuit Court of Appeals did not involve an important question of Federal law which has not been, but should be settled by this Court; nor has the Court of Appeals decided a Federal question in a way which conflicts with applicable decisions of this Court. The decision of the Court of Appeals was sound in all respects and in full accord with the decisions of this Court.

Respectfully submitted,
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APPENDIX

A. [OPINION OF THE SIXTH CURCUIT COURT OF APPEALS DATED AND FILED ON APRIL 8, 1974]

Before: MILLER, LIVELY and ENGEL, Circuit Judges.

Per Curiam. The plaintiff, a seaman, alleged in his complaint that he suffered an injury while in the service of his ship. He brought the present action against the shipowner for damages and maintenance and cure. Jurisdiction in the district court was founded on the Jones Act, 46 U.S.C. Sec. 688 et seq., and the general maritime law of the United States. The jury found that plaintiff was entitled to a limited award of maintenance and cure but denied recovery for damages. Both parties appeal.

The plaintiff was an oiler aboard the S/S "Robert S. McNAMARA". He alleges that in April of 1968, while replacing a lower engine room deck plate, he slipped and fell on the oily floor plate, causing his head to strike an electrical box. There is some doubt as to whether plaintiff reported the accident immediately after it occurred. In June of 1968 plaintiff was discharged from the vessel for failure to follow the orders of a superior officer. At that time the third assistant engineer prepared the discharge papers. He was then informed by plaintiff of the accident that had occurred in April. Plaintiff requested, and was given, a master's cerificate which permitted him to go to the U. S. Public Health Hospital in Detroit. Immediately upon leaving the vessel, plaintiff was examined at defendant's plant hospital and was declared "able to work". Subsequently, he was examined on three occasions at the Public Health Service Hospital. After each visit, he was prounced (sic) "fit for duty."

Plaintiff complained that after the accident he suffered from headaches and dizzy spells. At trial, Dr. Berke, a neurosurgeon, testified that he was unable to find any objective evidence of neurological damage. He did observe that when plaintiff stood with his eyes closed, he could not maintain "complete and perfect" balance. This difficulty suggested to Dr. Berke that plaintiff was suffering from a vestibular disorder—damage to the balancing mechanism of the inner ear. Dr. Heil, an otolaryngologist, testified that as a result of an electronystagmographic test, he concluded that the plaintiff had a vestibular disorder of the left ear. He stated that he was somewhat puzzled by the results of the test because the report of an earlier examination, by a doctor who did not testify at the trial, showed that a similar test had disclosed a vestibular disorder of the *right* ear. Dr. Heil was unable to offer any explanation for the discrepancy.

The jury found that the plaintiff was entitled to maintenance and cure from June 29, 1968, the date of his discharge, until June 29, 1970. Under the maritime law of the United States, a shipowner is liable to a seaman for maintenance and cure, regardless of the negligence of either party, if the seaman is injured while in the service of the ship. *Aguilar* v. *Standard Oil Co.*, 318 U.S. 724 (1943). The duty of the shipowner to maintain and care for the seaman exists only until the seaman is cured to the maximum extent medically possible. *Farrell* v. *United States*, 336 U.S. 511, 518 (1949). In brief, once the seaman reaches "maximum medical recovery", the shipowner's obligation to provide maintenance and cure ceases. *Vaughan* v. *Atkinson*, 369 U.S. 527, 531 (1962).

The defendant contends that the plaintiff's injury was

permanent from the date of the accident and was never susceptible of curative treatment. Dr. Heil testified that although he could not determine from his examination what had caused the vestibular disorder, a severe blow to the head could have caused this problem. Presumably, the jury concluded that it was plaintiff's fall that caused the disorder and the disabling dizziness and headaches. However, the evidence clearly shows that a vestibular disorder is not a condition that can be cured or improved by treatment. When asked whether plaintiff might be cured by treament, Dr. Heil testified:

> No, not really. Treatment is primarily symptomatic for this condition. That is, people with a vestibular disorder are apt to have intermittent episodes of dizziness which, on occasion, are somewhat more severe. Treatment is limited to those times when the patient is particularly dizzy. They can obtain some symptomatic relief with medication. Other than that, there is no specific cure or treatment.

No evidence was introduced in conflict with this conclusion of Dr. Heil.

The record in this case does not permit an inference other than that plaintiff's condition was permanent immediately after the accident. It is not even alleged that plaintiff has ever received treatment for the condition itself, although he has received medicine for the symptoms of dizziness and headaches. That one may require or be helped by treatment for the symptoms of a disorder does not qualify him for maintenance and cure. *Farrell* v. *United States, supra* at 519. We find that the jury award

of maintenance and cure is without material support in the record.[1]

When the jury returned its verdict, the foreman stated that the jury had found no cause of action for either negligence or unseaworthiness because it believed that the accident "was due to the sole negligence of the plaintiff, Julian Vella." Plaintiff contends that the jury's findings on negligence and unseaworthiness were caused, at least in part, by the following instruction:

> [I]f you find the plaintiff was guilty of contributory negligence and that such contributory negligence was the sole cause of his injuries, you must return a verdict for the defendant.

Plaintiff alleges that the trial court committed reversible error in giving this instruction because there was no evidence that the accident was caused solely by the acts of the plaintiff.

As an abstract statement of law, plaintiff is correct when he asserts that an instruction on sole cause is improper if there is no evidence to support such a finding by the jury. *See McCarthy* v *Pennsylvania Ry. Co.*, 156 F2d 877 (7th Cir. 1946). In the present case, however, there was sufficient evidence to support the charge and the jury's conclusions. The plaintiff was an oiler on the "McNAMARA" and was responsible for keeping the area near certain moving machinery free from oil. There was evidence that it was his responsibility to remove the very

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[1] We are aware that the Third Circuit has taken a very liberal view as to when maintenance and cure may be awarded. *See Ward* v. *Union Barge Line Corp.*, 443 F2d 565 (3rd Cir. 1971). This is definitely a minority position and is difficult to square with *Farrell* v. *United States*, 336 U.S. 511 (1949). *See Berke* v. *Lehigh Marine Disposal Corp.*, 435 F.2d 1073, 1076 n. 3 (2nd Cir. 1970).

oil upon which he slipped. Moreover, there was testimony that plaintiff used improper procedures in trying to lift rather than slide the plate into place. We are not prepared to find that the record is lacking in material evidence to support the jury's verdict on the "sole cause" issue.

The judgment of the district court is therefore affirmed in part and reversed in part and the action is remanded for entry of an order of dismissal.

B. [TRANSCRIPT OF DISTRICT COURT'S DECISION ON MOTION FOR JUDGMENT NON OBSTANTE VERDICTO DATED JULY 17, 1972]

The Court has before it really two motions. The first one is a motion for a judgment not withstanding the verdict in favor of the plaintiff concerning Plaintiff's claim for maintenance and cure. In this case, the plaintiff was employed as a seaman on the S.S. Robert McNamara until his discharge on June 28, 1968. During the course of the preparation of his discharge papers, he claimed to have been injured in a fall on April 4, 1968, and it is these alleged injuries which eventually led to the plaintiff's action against the defendant that we are concerned with here.

The plaintiff's action was in three counts: One, for negligence under the Jones Act; two, for unseaworthiness under the general maritime law; and three, for maintenance and cure. Following a lengthy trial, the jury returned a verdict of no cause for action as to the first two counts but awarded Plaintiff eight dollars a day from June 29, 1968 to June 29, 1970 for maintenance and cure. And the defendant has now made this timely motion for judgment n.o.v.

In this regard, the defendant takes two positions. First, he argues that the plaintiff offered no proof that his injury was caused while in service of the ship and that he failed to bring himself within the scope of maintenance and cure. Second, the defendant maintains that the plaintiff failed to prove he suffered from a curable disability for which he obtained curative rather than palliative treatment, and that since maintenance and cure applies only for curative treatment, the plaintiff should not have recovered.

Now, a motion for judgment notwithstanding the verdict may only be granted when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment. *Rithe* versus *Saginaw*, 337 Fed 2nd 393. Here the defendant would have the Court conclude, without weighing the evidence, that the only reasonable conclusion from the evidence presented is that Plaintiff did not suffer an injury while in the service of the ship. However, there was evidence presented to the jury that some time after the fall the plaintiff suffered dizziness which was eventually diagnosed as a vestibular labyrinthine disorder. To infer from this that the fall caused the disorder is not unreasonable. Well, the Court may not have decided the same way from the facts presented, but the jury did. The fact that physical examinations immediately subsequent to the alleged fall did not detect the disorder is not conclusive of the issue since those examinations did not include certain tests which a disorder of the sort allegedly suffered here could be detected with.

For the second point, that Plaintiff's treatment was not curative but palliative in nature and therefore not within the scope of maintenance and cure, the defendant

points to the testimony of Dr. Heil, the ear specialist, who testifies that there is no known cure for the vestibular deficit suffered by Plaintiff. While it is true that maintenance and cure is not available for a sickness declared to be permanent, it is also true that maintenance and cure continues until such time as the incapacity is declared to be permanent. *Marzean* vs *Nicholson Transit Company*, 1974 Fed Supp 348, an Eastern District of Michigan case decided by Judge Thornton. Let me read from that case on page 349:

> "The rule to be applied in limiting the maintenance and cure recovery is laid down in *Farrell* vs *United States*, 336 US 511. The Court there quotes from a draft convention submitted in 1936 by the General Conference of the International Labor Organization in Geneva, subsequently ratified by the Senate and proclaimed by the President effective for the United States on October 29, 1939. The provision quoted in the *Farrell* case states that maintenance and cure continues until the seaman is cured or until 'the sickness or incapacity has been declared of a permanent character.' The Court cites approvingly in this connection"—

And then cases are cited.

> "At most, recovery should not be extended beyond the time when the maximum degree of improvement to his health is reached. We can find no authority approving a longer period of recovery. Recovery of maintenance and cure should not extend beyond the time when a maximum degree of improvement in the health of an injured seaman has been reached."

Then on page 350:

> "We think that the only proper interpretation of the rule is that once the administration of curative treatment has ceased because medical science can do no more for the patient to improve his condition, then the seaman's right to maintenance and cure ceases."

Now, the Court agrees with the principal (sic) spelled out by Judge Thornton in this case. In our case, the only physician competent to testify as to the permanence of the plaintiff's incapacity was Dr. Heil, the ear specialist. Dr. Heil did not even examine the plaintiff until March 20, 1972. However, the jury did not grant maintenance and cure past June 29, 1970, almost two years before the declaration that the condition was permanent. Thus, the jury found that for the period for which a judgment was granted, the plaintiff was entitled to maintenance and cure.

Now, as I said earlier, a motion for judgment n.o.v. may only be granted when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment. In the opinion of the Court, it just cannot be said that from the facts, from the testimony without weighing the credibility of the evidence, there could be but one reasonable conclusion. For this reason, I'm going to deny the motion for judgment n.o.v.

With regard to the other motion filed by the plaintiff under Rule 60(B) for relief from judgment on the grounds that the Court had been in error when it did not award Plaintiff interest on the judgment for maintenance and cure and counsel fees, on the issue of interest, the defendant argues that the plaintiff did not ask for prejudg-

ment interest in his complaint. Defendant further argues that since Plaintiff elected to bring the action on the civil side rather than in admiralty, the plaintiff is bound by the rule that in federal cases where jurisdiction is based upon federal law rather than upon diversity, interest on a personal injury claim runs from the date of entry of judgment rather than from the date of judicial demand, citing the case of *Divernay* vs *Alcoa Steamship Company,* 217 Fed Supp 698 at page 700. While this issue arises out of a claim for maintenance and cure rather than personal injury, the same reasoning used by the Divernay Court would apply here. There the Court said and I quote:

> "In the instant case, which was predicated upon a federal statute, the Jones Act and upon maritime law, it is the opinion of this Court that Title 28, U.S. Code, Section 1961 is controlling in that interest runs only from the date of entry of judgment."

Our case also is founded on federal maritime law and was brought on the civil side. However, even if Title 28, Section 1961 does not apply to the claims for maintenance and cure, the plaintiff would not prevail. In *Rouald* vs *Cargo Carriers, Inc.,* 243 Fed Supp 629, the Court said at page 633:

> "The award of interest and attorney's fees is discretionary with the Court. That being the case, Plaintiff is incorrect in alleging, as he does, that he is entitled to prejudgment interest as a matter of law."

It follows that the Court was not in error when it declined to award interest on this judgment. Thus, Plain-

tiff's reliance on Rule 60(B) for relief from judgment on the grounds of mistake is ill founded. The same applies with regard to Plaintiff's contention that the Court was in error as a matter of law in not awarding attorney's fees. This, like the awarding of interest, is a matter for the Court's discretion. *Rouald* vs *Cargo Carriers, Inc.*, 243 Fed Supp 629.

The plaintiff has cited to the Court the case of *Jordan* vs *Norfolk Dredging Company*, 223 Fed Supp 79, which construes *Vaughn* vs *Atkinson*, 369 US 527, on the question of whether award of attorney's fees to a plaintiff in a maintenance and cure claim was dependent on a showing of callous behavior on the part of a ship owner in withholding maintenance and cure. The Jordan Court concluded that under *Vaughn*, payment of attorney's fees was proper regardless of callousness of the ship owner. Defendant, on the other hand, has cited to the Court cases which reach exactly the opposite conclusion about *Vaughn* and hold that ship owners' callousness isn't a necessary prerequisite for the recovery of attorney's fees. *Robertson* vs *S.S. American Builder*, 285 Fed Supp 794, 1967; *Roberts* vs *S.S. Argentina*, 1964 A.M.C. 1696.

It is clear, as the Court in *Robertson* vs *S.S. American Builder* explicitly noted, that the courts have not arrived at a consistent rule with this regard. In view of this inconsistency, the Court here feels that the presence or absence of callousness is a useful factor to help the Court in the exercise of the discretion it has to award or withhold attorney fees.

In our case, it is not disputed that the ship owner withheld maintenance and cure in a good faith belief, based

upon physical examinations of the plaintiff following his fall, that the plaintiff was fit for duty. Since there is no evidence of callousness on the part of the defendant, attorney fees will not be awarded. For these reasons, Plaintiff's motion for interest and attorney fees is denied as well.